79-595

IN THE

# Supreme Court of the United States

OCTOBER TERM 1979

No. 79-

SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, CONSUMER ACTION NOW, JOAN MCCALL and SUSAN MAINWARING,

*Petitioners,*

—v.—

LONG ISLAND LIGHTING COMPANY,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN ADVANCE OF JUDGEMENT**

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TABLE OF CONTENTS


| | |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 10 |


TABLE OF AUTHORITIES


| | |
|---|---|
| Consolidated Edison, et al. v New York Public Service Commission, No. 79-134 | passim |
| Board of Education v Allen, 392 U.S. 236(1968) | 8 |
| Office of Communication,FCC v F.C.C., 359 F.2d 994 (D.C. Cir. 1966) | 10 |

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SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, CONSUMER ACTION NOW, JOAN McCALL and SUSAN MAINWARING,

Petitioners,

-v.-

LONG ISLAND LIGHTING COMPANY,

Respondents.

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Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit In Advance of Judgement

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Scientists Institute for Public Information ("SIPI"), Natural Resources Defense Council, Inc. ("NRDC"), Friends of the Earth ("FOE"), Consumer Action Now ("CAN"), Joan McCall and Susan Mainwaring, public interest groups which include ratepayers, and individual ratepayers, petition for a

writ of certiorari to the United States Court of Appeals for the Second Circuit to review, prior to judgement, that portion of a decision of the United States District Court for the Eastern District of New York which upholds the constitutionality of the New York Public Service Commission's ban on the use of utility bill inserts for the dissemination of controversial information on issues of public policy.

## OPINIONS BELOW

The opinions of the District Court are unreported. They are set out in the Appendix, infra, pp. 1a and 62a.

## JURISDICTION

The judgement of the District Court was entered on March 30, 1979. On April 16, 1979, the Court denied a motion for additional findings of fact but granted a stay pending appeal. A notice of appeal was timely filed by respondent Long Island Lighting Company on April 25, 1979 and the record on appeal was docketed in the United States Court of Appeals for the Second



Circuit on June 14, 1979.

On October 1, 1979, this Court noted probable jurisdiction in Consolidated Edison, et al. vs. New York Public Service Commission, No. 79-134, a case on appeal from a decision of the New York Court of Appeals which involves the same subject matter as the case at bar, and which raises the same constitutional issues as does the case at bar.

This petition for certiorari prior to judgement of the Court of Appeals is filed pursuant to Rule 20 of the Rules of the Supreme Court. Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether an order of the New York State Public Service Commission which prohibits utilities from utilizing bill inserts in order to express their views on "controversial matters of public policy," violates the First Amendment, and whether the words "controversial matters of public policy" are unconstitutionally vague.

2. Whether a writ of certiorari should be granted prior to judgement in the

Court of Appeals, where probable jurisdiction has been noted in a case raising identical constitutional questions and:

a. the case at bar, unlike Consolidated Edison vs. Public Service Commission, contains a full record of facts necessary to decide the First Amendment questions presented in both cases; and

b. the parties in the case at bar represent the ratepayers and the public, whose interests are broader than the Public Service Commission, which is the sole defendant in the Consolidated Edison case.

## STATEMENT OF THE CASE

In July 1976, acting in response to the requests of Petitioners SIPI and others, the New York Public Service Commission ("PSC") issued a notice of proposed policy statement on the subject of advertising by utilities. SIPI and others contended that utilities were employing utility bill inserts to disseminate pro-nuclear propaganda at ratepayer expense, and requested "shared access" to the bill inserts for the purpose of expressing their contrary views.

On February 25, 1977, the PSC issued



its policy statement, deciding, in part, to ban the use of bill inserts for the utilities' view on "controversial issues of public policy."[1/] On July 14, 1977 the PSC denied petitions for rehearing and issued an additional order adhering to its prior ban on "controversial" utility bill inserts.

On May 6, 1977 the respondent, Long Island Lighting Company ("LILCO"), brought an action pursuant to 42 U.S.C. §1983 in the United States District Court for the Eastern District of New York to challenge the Policy Statement's ban on utility bill inserts as a violation of its First Amendment rights. SIPI, NROC, FOE, CAN and the two individual ratepayers sought and were granted permission to intervene as party defendants on the bill insert issue. They fully participated in the case thereafter.

While discovery was proceeding in the LILCO case, another utility, Con Edison,

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1/The Policy Statement also included a total ban on the utility companies' promotion of electric space heating. That ban was upheld by the New York Court of Appeals, but struck down by the District Court below. It was, not however, the subject of the appeal filed by Con Edison, and review by certiorari is not sought here.

filed a state court action challenging the same PSC Policy Statement on precisely the same grounds as LILCO. The State Supreme Court invalidated the bill insert ban, its decision was reversed by the Appellate Division, Third Department, the New York Court of Appeals affirmed, and it is that case which is now before the Court in No. 79-134.

The Con Edison case went through the New York courts solely on the pleadings. There was no discovery or other attempts to make a record on the factual issues raised by the utilities' First Amendment claims.

New York law does not require that the parties to an administrative rulemaking be notified when the Policy Statement which results from that rulemaking is challenged in a court action. Accordingly, SIPI and its co-defendants did not learn of the Con Edison state court action until the permissible time to move for intervention had passed. The state court action thus proceeded with the utility bill insert ban defended by the PSC which had issued it, but not by the public interest and ratepayer groups which had requested it and had argued



that it was constitutionally compelled[2/]

The case at bar was decided on March 30, 1979 and an appeal was taken to the United States Court of Appeals for the Second Circuit. On May 1, 1979 the New York Court of Appeals decided the parallel Con Edison state action, 47 NY2d 94 417 NYS2d. 30 (1979). An appeal to this court was filed on July 27, 1979, 48 L.W. 3141, and probable jurisdiction was noted on October 1, 1979.

## REASONS FOR GRANTING THE WRIT

By noting probable jurisdiction in Consolidated Edison, this Court has already recognized the importance of the First Amendment issues presented in this case. The question then is whether to grant the writ in advance of judgement by the Second Circuit. There are strong reasons for doing so.

The Court has granted certiorari in advance of judgement below when a case involving similar or identical constitutional

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2/Petitioners here did appear as amicus curiae throughout the state court proceedings but, of course, had no part in the actual litigation of the case.

issues is already before the Court. See Stern and Gressman, Supreme Court Practice (Fourth Ed.) §4.21, n. 48. That is so here. Beyond that bare fact, however, there are two especially compelling reasons to grant certiorari now in this case.

First, as Mr. Justice White pointed out in Board of Education vs. Allen, 392 U.S. 236, 248 (1968), adequate adjudication of First Amendment cases requires a full factual record; adjudication on the pleadings alone will often be insufficient to allow a thorough examination of all the implications arising out of a First Amendment claim. In the case at bar, the facts have been developed through pre-trial discovery, as they were not in Consolidated Edison, in a way that will enhance the Court's capacity to decide the constitutional issues on facts, rather than on abstractions. For example, the record in this case contains evidence which shows that the use of bill inserts is not the most economical method of communication (A. 340-41, 368);[3/] that it

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3/The symbol "A" refers to the Joint Appendix filed in the Court of Appeals



is not the most effective means of communication (A. 368-371, 392-396, 404-405); and that those ratepayers who might opt out of receiving unwanted public issue inserts, would also be deprived of information which they desired and to which they were entitled, such as information on billing practices and emergency procedures (A. 387-388).

None of those facts and others which are relevant to the adjudication of the constitutional issues in this case, were developed in Consolidated Edison. They will be before the Court, however, if certiorari is granted in this case.

Second, the parties in this case consist of public interest groups and individual consumers. The only competing party in Consolidated Edison is the New York State Public Service Commission. Consequently, the Court's adjudicatory process will be enhanced for the additional reason that it will be hearing from consumers and consumer representatives themselves, rather than from the State regulatory body alone. As the Chief Justice pointed out, when a Circuit Court judge, regulatory commissions do not always adequately represent the consuming public, the real parties in interest, and

their proceedings add an invaluable and tangible dimension to the process of adjudication. Office of Communication UCC vs. F.C.C., 359 F.2d 994, 1003 (D.C. Cir. 1966). Thus, by granting this petition for certiorari, the Court will have available the perspective brought to the issues in the case by consumers themselves.

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted in advance of judgement below.

Respectfully submitted,

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# APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

-against-

THE NEW YORK STATE PUBLIC SERVICE COMMISSION et al.,

Defendants.

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DOCKET NO. 77 C 972

MEMORANDUM AND ORDER

PRATT, J:

## I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use, and (2) LILCO's use of inserts in its billing envelopes to disseminate its views on the uses and benefits of nuclear energy. The action is brought pursuant to 42 USC §1983

and its jurisdictional counterpart, 28 USC §1343(3); the Declaratory Judgment Act, 28 USC §2201 et seq.; and the first and fourteenth amendments. Jurisdiction of a federal question is also alleged under 28 USC §1331(a), the rights at issue allegedly being valued in excess of $10,000.[1/]

By memorandum and order dated August 31, 1977, the court permitted certain organizations and individuals to intervene, pursuant to FRCP 65, for a preliminary injunction, or in the alternative, for summary judgment pursuant to FRCP 56. PSC cross-moves to dismiss the action, based on the Johnson Act, 28 USC §1342.

For purposes of the summary judgment motion, LILCO has conceded the existence of certain material facts alleged by the defendants to be in dispute, although the latter assert that even with such concessions, some material issues of fact remain. Nonetheless, as more fully explained below, the court determines that there are no disputed facts which are material to the dispositive issues.



## II. BACKGROUND AND NATURE OF THE ACTION

### A. The Parties.

LILCO, a New York corporation, is a public utility engaged in the business of generating and supplying electrical and gas energy to approximately 900,000 residential and commercial customers in the counties of Nassau, Suffolk, and parts of Queens.

PSC is the public authority charged, pursuant to Article IV of the New York Public Service Law, with general powers and supervision and regulation over the activities of gas and electrical utilities. See NY Pub. Serv. Law §§§65, 66.

Intervenors are several individuals and non-profit organizations involved in the dissemination of information on nuclear power issues. Members of the organizations and the individual intervenors are customers of New York utilities, including LILCO, and have been recipients of bill inserts expressing views with which they disagree.

B. PSC's Policy and Orders.

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electrical energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electrical corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * *". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subject of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies," (Policy Statement). As part of that statement PSC concluded "that the



existing ban on promotion of electricity sales should be continued."

Simultaneously with the policy statement, the commission issued an "order implementing certain restrictions on utility advertising" in which it ordered that

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.
> PSC order issues 2/25/77;
> Ex. III to complaint.

Several public utilities petitioned for rehearing, and on July 14, 1977, PSC issued its order denying those petitions.

On first amendment grounds, LILCO challenges both PSC's continued absolute prohibition against a utility's advertising to promote the use of electrical energy, and its order forbidding the use of bill inserts to present views of LILCO's management on "controversial issues of public policy." LILCO was and is directly affected by both bans, because it wishes to resume its promotion of electrical space heating for residences, and

it wishes to resume use of bill inserts as a means of promoting management's views on nuclear power, an issue of public policy that concededly is controversial, particularly on Long Island where LILCO is now engaged in planning and constructing two nuclear powered generating stations.

C. State Court Proceedings.

After this action has begun, other New York public utilities commenced two Article 78 proceedings in the New York State Supreme Court, Albany County, challenging the same two aspects of the 1977 policy statement and order that are at issue here. In separate decisions dated February 17, 1978, Judge Miner upheld PSC's ban on promotional advertising, but invalidated the ban on bill inserts, finding it to be an unconstitutional restriction on commercial speech. In a brief decision dated July 21, 1978, the Appellate Division, Third Department affirmed on the bill insert issue, but reversed on the promotional advertising issue, thus finding both bans to be constitutional and within PSC's statutory authority. Appeals in both cases are now pending before the New York State Court of Appeals.



D. PSC's Motion to Dismiss.

PSC's motion to dismiss the action on the basis of the Johnson Act, 28 USC §1342, is denied. That statute deprives the district court of jurisdiction, under certain circumstances, to "enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency * * *." 28 USC §1342.

PSC argues that rate issues are involved in both parts of this case in that (1) promotional advertising of electrical energy will eventually cause an increase in rates to consumers, and (2) using bill inserts to promote nuclear energy requires ratepayers to subsidize part of the mailing cost. Thus, according to PSC, both of the challenged orders are based on its rate-making responsibilities.

The Johnson Act "proscribes federal court injunctions of orders affecting public utility rates", United States v. Public Service Com'n., 422 F Supp 676, 678 (D Md. 1976) (emphasis in original). While it has been considered that the act's prohibition

"is not avoided by basing the action on the civil rights provisions of 28 USC §1343(3) and 42 USC §1983", Klotz v. Consolidated Edison Co. of New York, Inc., 386 F Supp 577, 584 (SDNY 1974), it has also been held that "[t]he Johnson Act does not apply to [a] civil rights complaint" that attacks a public electric utility's credit policy, without challenging its electric rates. Cody v. Union Electric Company, 545 F2d 610, 611 (CA8 1976). As in Cody, the action here does not challenge any rates set by PSC; rather, the complaint alleges that PSC's orders violate LILCO's civil rights under 42 USC §1983 and the first amendment. Such allegations, if proved, "justify federal remedial action". Id. at 612

The relationship between PSC's orders and public utility rates in New York is indirect, remote, even debatable. Essentially, PSC argues that the effect of these activities, if not proscribed, would be to increse the cost of electricity and thereby force a change in public utility rates. But virtually all that PSC does has similar potential effects on the cost of services, and the Johnson Act was not intended to immunize all public utility activity from federal court



injunctions; instead, it prohibits review only of "any order affecting rates." To fall within the Johnson Act's prohibition, therefore, a challenged order must more directly affect rates than do the ones here under attack. Accordingly, PSC's motion to dismiss is denied.

## III. COMMERCIAL SPEECH

Before addressing the two main issues of the case, the court must first consider the role of commercial speech under the first amendment. Until recently the first amendment's protection of commercial speech was severely limited. See, e.g., Valentine v. Chrestensen, 316 US 52 (1942). In a series of cases decided since 1974, however, commercial speech has received extensive consideration and analysis, and its protection under the first amendment has been greatly expanded.

In Bigelow v. Virginia, 421 US 809 (1975), the Supreme Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." Id. at 818. In that case, the Court balanced the first amendment interest against the govern-

ment interest allegedly served by a regulation making it illegal to sell or circulate any publication encouraging or promoting the processing of an abortion. Holding the statute to be an unconstitutional infringement of the first amendment, the Court noted:

> We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. * * * To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the government interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> Id. at 825-26 (citations and footnotes omitted).

That commercial speech is entitled to first amendment protection was confirmed in Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 US 748 (1976),



where the Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information effect upon its disseminators and its recipients." Id. at 773.

First amendment protection for commercial speech has been reiterated and reaffirmed in still more recent cases. In Linmark Associates, Inc. v. Township of Willingboro, 431 US 85 (1977), the Court struck down a local ban on the posting of "For Sale" signs on residential property, holding that the ordinance in question impaired the flow of truthful and legitimate commercial information to residents. In Carey v. Population Services International, 431 US 678 (1977), the Court struck down a ban on advertising contraceptives because the information was a matter of substantial individual and societal interest. In Bates v. State Bar of Arizona, 433 US 350 (1977), the court struck down an absolute ban on lawyer advertising, holding that such commercial speech "serves individual and societal interests in assuring informed and reliable decision making", id. at

364, and is, therefore, entitled to constitutional protection.

More recently in First National Bank of Boston v. Bellotti, ___US___, 98 SCt 1407 (1978), the Supreme Court addressed a matter of collateral concern here, the first amendment rights of a corporation, and flatly rejected the proposition that speech by business entities is not protected by the first amendment. Invalidating a statute that prohibited a corporation from spending corporate funds in order to disseminate views on state referenda whose issues were not materially related to the company's business, the Court noted that:

> [i]f the speakers here were not corporations, no one would suggest that the State court silence their proposed speech. It [discussion of governmental affairs] is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.
> Id., 98 SCt at 1416.

Thus, simply because LILCO is a public utility corporation does not deprive it of all first amendment rights.



To determine the constitutionality of the challenged bans on LILCO's communications, the court must balance the first amendment interests asserted by LILCO against the government interests claimed to be served by PSC's orders. See Bigelow v. Virginia, supra, 421 US at 826; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Linmark Associates Inc. v. Township of Willingboro, supra. The balancing analysis must be applied separately to PSC's prohibitions against promotional advertising and controversial bill inserts.

## IV. PSC's BAN ON PROMOTIONAL ADVERTISING OF ELECTRICAL ENERGY

### A. Factual Background

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electrical space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the summer months,

attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electrical space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electrical space heating. Despite conten-



tions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricy advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." 1977 Policy Statement at 5.

In short, PSC continued its ban on promotional advertising of electricity in order to reduce consumption of electricity and other energy resources. PSC did, however, permit public utilities to advertise time-of-day rates as a means of encouraging shifts of electrical energy consumption from peak to off-peak times, without increasing aggregate sales, and it indicated that should there be a sufficient change in conditions it would from time to time reexamine its ban on promotional advertising of electrical energy.

Although it may not advertise electric heat, LILCO is permitted to provide advice and information to any individual who requests such information. Moreover, PSC has not barred public utilities from advertising the merits of gas fired space heating, nor does it restrict advertising for oil fired space heating, since PSC has no jurisdiction over oil dealers.

Without conceding their truth, LILCO has assumed the following allegedly material facts solely for purposes of the motion for summary judgment:

1. That electric space heat consumes more oil than oil fired space



heating;
2. That electric space heating is ecologically less desirable than oil fired space heating;
3. That promotion of electric space heating may cause a general rise in the demand for electricity; and
4. That there is substantial difficulty in establishing a pricing structure for electric space heating service which accurately reflects the marginal cost of providing such service to each consumer.

PSC urges, however, that other allegedly material facts are in dispute and prevent summary judgment. First, PSC asserts that LILCO's concession on pricing structure is limited only to electric space heating, when the issue is whether the rates charged for all electric service can be based on an economically efficient pricing structure which would also adequately reflect the marginal costs of electric production for all consumers of electricity. Second, PSC contends that promotion of electric space heating will lead to greater use of heat pumps, which will in turn produce an increase in the peak-time (summer) consumption of electricity due to increased use of air conditioning. Finally, PSC claims there is a factual issue as to whether increased

electric production by LILCO would result in increased use of energy inefficient gas turbines, the costs of which would be passed on to all of LILCO's customers, not just those who use electric space heaters.

These factual issues raised by PSC are more appropriate to a PSC proceeding involving the merits of electric heat or a proper pricing structure for electric heat rates. They are not material to a decision on LILCO's first amendment challenge to PSC's flat ban on all promotional advertising of electrical energy. The issue is not whether PSC may directly prohibit or restrict the use of electric heat, but whether PSC may attempt to do so by preventing public utilities from truthfully advertising its advantages. On this issue the merits or demerits of electric heat are simply not material.

B. Discussion

To decide this issue, the court must assess LILCO's and the public's first amendment interests in the free flow of information contained in the advertising, and then determine whether such interests are outweighed by the public interests allegedly served by the



ban on such advertising. See Bigelow v. Virginia, supra, 421 US at 826; Metpath, Inc. v. Imperato, 450 F Supp 115, 117 (SDNY 1978).

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See Bates v. State Bar, supra, 433 US at 363-64; Virginia State Board v. Virginia Citizens, supra, 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has

an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in Bates v. State Bar, supra,

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> Bates v. State Bar, supra, 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." Virginia State Board v. Virginia Citizens, supra, 425 US at 756.



The next question is whether the interests allegedly further by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electrical consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative -- the prohibition of advertising -- serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that



> is based on the benefits of public ignorance.
>
> Bates v. State Bar, supra, 433 US at 374-75 (emphasis supplied).

In Virginia State Board, supra, a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proferred justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * *[T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
>
> * * *

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if

only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

* * *

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia State Board v. Virginia Citizens, supra, 425 US at 768-70 (emphasis supplied) (citations omitted).

PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Ser. Law §66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See Virginia State Board, supra, 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting



communication to a customer if he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in Bates v. State Bar, supra; on posting "For Sale" signs on homeowners' laws in Linmark Associates v. Township of Willingboro, supra; on advertising prices of prescription drugs in Virginia State Board, supra, or on advertising contraceptives in Carey v. Population Services, supra. Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication'". Linmark Associates, Inc. v. Township of Willingboro, supra, 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat

through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> First National Bank v. Bellotti, supra, 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information." Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive



of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

## V. PSC's BAN ON CONTROVERSIAL BILL INSERTS

### A. Factual Background.

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined that bill inserts should not be used to express the opinion of management of "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues



> (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.
>
> 1977 Policy Statement at 10-11.

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the

bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "primarily to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the govern-



ment. In its view, this aspect makes the utility bill insert medium analagous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. Id. at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." Id. at 8. PSC also noted that the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purposes of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket

expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2/]

PSC and intervenors argue that there is a factual dispute to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of



political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See SEC v. Research Automation Corporation et al., 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶25;

a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, it also provided. LILCO 9(g) Statement, Part B, ¶¶25-26. From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event; the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an in-



sert is less than the cost of a separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. Discussion.

1. LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.

In First National Bank v. Bellotti, supra, the Supreme Court rules that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on

the identify of its source, whether corporation, association, union or individual." Id., 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seeks to discuss the merits of nuclear energy, a matter of current debate and divergent opinions. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 479 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amend-



ment was designed to protect, see Bellotti, supra, 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. PSC's ban is not unconstitutionally vague.

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three problems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3/]

Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account,

number 426,4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4/]

PSC interprets this special cost-allocation account to include

> All advertising which seeks to sway opinion -- legislative, environmental, governmental, consumer or any other kind -- to the industry's position on public policy disputes.
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." Id. The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be



recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determinations. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We

believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.

Order Denying Petitions for Rehearing, supra at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> Connolly v. General Construction Company, 269 US 385, 391 (1926).

In the context of the first amendment, the Court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms * * * "; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." * * * When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider



> of the unlawful zone * * *." * * * For "[t]he threat of sanctions may deter * * * almost as potently as the actual application of sanctions."
>
> Kevishian v. Board of Regents, 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts * * *." Laurence H. Tribe, American Constitutional Law 719 (1978). In Smith v. Goguen, 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope * * * is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." Id. at 573. See also Grayned v. City of Rockford, 408 US 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 US 156, 162 (1972); Lanzetta v. New Jersey, 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from

bill inserts is unconstitutionally vague. In context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

LILCO also cites First National Bank v. Bellotti, supra, to support it vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those "materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent effect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself were unobjectionable, the limitation in [the



> statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties -- personal as well as corporate -- provided for in [the statute]. * * * As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporations's business of a particular referendum issue.
>
> Id., 98 SCt at 1420, n. 21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than Bellotti's "materially affecting" standard. Bellotti, however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regula-

tion the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachusetts statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitutional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. PSC's ban does not otherwise infringe LILCO's first amendment rights.

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.
>
> Order Denying Petitions for Rehearing, supra at 10.



Thus, PSC's order is not an absolute ban but rather, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." Linmark v. Township of Willingborough, supra, 431 US at 93.

The Supreme Court has

> * * *often approved [time, place or manner restrictions] provided that the content of the regulated speech that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
>
> Virginia State Board v. Virginia Citizens, supra, 425 US at 771.

See also Grayned v. City of Rockford, supra, 408 US 115-17; Buckley v. Valeo, 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on

"controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As Virginia State Board, supra teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public -- newspaper advertisements, public speakers, or even house-to-house canvassing -- are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of view. LILCO, in other words, is surely no worse off than other would-be



communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely, to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service -- such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of

providing service, and the like
1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content -- controversial issues -- that LILCO had been denied accesss to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit the classic mold of a time, place, or manner restriction.



A content based restriction was upheld by the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun noted that American constitutional jurisprudence has been jealous to "preserve access to <u>public places</u> for purposes of free speech" but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of

protection afforded by the Amendment to the speech in question." Id. at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or indivious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." Id. at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.
>
> Id. at 304.



Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." Id. at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination based "solely upon subject matter or content" is Id. at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any

form is forbidden", id. at 317, and he found impossible to draw with accuracy either "the line between ideological and nonideological speech" or a "manageable line between controversial and non-controversial messages." Id. at 319-20. Nor did he accept the avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". Lehman shows that if there is not public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. Cf. Tribe, supra, at 692-93. Such restrictions were upheld in Connecticut State Federation of Teachers v. Board of Education Members, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora required to be made available to a minority union. And in Buckley v. Prentice, 410 F Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical



events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F Supp at 1247.

Comparing Lehman, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were amply alternative forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in Lehman, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's difficulty in finding a manageable line between controversial and non-controversial messages in Lehman may be resolved here through the existing

interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In Lehman, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public



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interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In Lehman, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages



on its car cards were that the limitations on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium for over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition,

PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in Lehman. As the Supreme Court found in Police Department of Chicago v. Moseley, 408 US 92, 96, 92 SCt 2286, 2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences now flow from a determination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in Lehman upheld against a first amendment challenge a governmental prohibition against "political and public issue adver-



tising" on rapid transit vehicles. A fortiori, PSC's ban on "
issues of public policy" from the bill inserts of New York public utilities does not infringe the first amendment.

## VI. CONCLUSION

On the promotional advertising issue, LILCO is entitled to judgment (a) declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant PSC on February 25, 1977, and all subsequent implementing orders of the PSC, to the extent that they prohibit plaintiff LILCO from truthful promotional advertising of electric space heating, violate the first amendment and are, therefore, unconstitutional, and (b) enjoining PSC from enforcing the prohibition.

On the bill insert issue, PSC and the intervenor defendants are entitled to judgment declaring that the portion of the order issued by PSC on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the

dissemination of the utility's position on controversial matters of public policy," does not infringe LILCO's rights under the fourteenth amendments to the United States Constitution.

The Clerk shall enter judgment accordingly.

SO ORDERED.

Dated: Westbury, New York
March 30, 1979.

/s/
GEORGE C. PRATT
U. S. DISTRICT JUDGE



F O O T N O T E S

1/ Since 42 USC §1983 is a sufficient prediction under 28 USC §1343(3), the direct constitutional claims asserted under 42 USC §1331(a) and the first and fourteenth amendments are disregarded. See Monell v. Dept. of Social Services, ___ US ___, 98 SCt 2018 (1978); Turpin v. Mailet, 579 F2d 152 (CA2 1978), judgment vacated, 47 USLW 3368 (US Nov. 27, 1978), modified on remand, 47 USLW 2474 (CA2 Jan. 16, 1979) (en banc).

2/ PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prosepctive rate changes:

> While other methods of modification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.
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> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

3/ Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorized 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

4/ The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
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> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LONG ISLAND LIGHTING COMPANY,

Plaintiff,

-against-

THE NEW YORK STATE PUBLIC SERVICE COMMISSION, et al.,

Defendants.

----------X

DOCKET NO. 77 C 972

MEMORANDUM AND ORDER

PRATT, J:

Defendant New York State Public Service Commission (PSC) has moved, pursuant to FRCP 52(b), for the court to amend or make additional findings of fact in connection with the memorandum and order of March 30, 1979, declaring that PSC's ban on New York utilities' promotional advertising of electric space heating violates the first amendment. In addition, PSC seeks a stay of the court's order pending determination of the Rule 52(b) motion and appeal. Plaintiff Long Island Lighting Company (LILCO) opposes PSC's motion and the request for a stay.



As grounds for the Rule 52(b) motion, PSC argues that the court, in its March 30, 1979 opinion, "omitted or misconstrued certain material facts supporting state interests that PSC had alleged. Specifically, PSC asserts (1) that the court did not account for the constant availability of base load generating facilities during the winter months, and their increased oil usage to generate more electricity; (2) that the court erred in stating that the PSC has not barred utilities from advertising the merits of gas fired space heating; (3) that the court omitted certain factual allegations by PSC concerning the effect of promotional advertising on electric rates; (4) that the court did not address the impact on consumers of improperly structured rates stemming from promotional advertising; and (5) that the court failed to discuss PSC's allegation that promotional advertising of electric space heating would stimulate a general rise in demand for electricity, thereby obstructing efforts by PSC and utilities to conserve energy. PSC also argues that the court was incorrect in concluding that the factual issues raised by PSC are relevant to direct regulation of electric heat, but not to promotional advertising of electric heat.

While PSC argues that the court "omitted or misconstrued" certain facts, the decision reveals that the court assumed, for purposes of the decision, that promotional advertising would increase the demand for electricity, would require use of more oil to generate the electricity, and would have an effect on electric rates. With respect to the claim that there would be an adverse effect on consumers because of rates which had been improperly structured by the PSC, the court assumed that it has within the power of the state, either through the PSC or the legislature, to restructure the rates should that be necessary.

With respect to utility advertising of gas fired heating, the court erred in stating that the PSC has not barred such advertising, but the court does not consider this fact to be dispositive of the underlying issue in this aspect of the case: whether PSC may do indirectly, through a ban on promotional advertising, that which it has thus far chosen not to do directly, that is, restrictions on usage of electricity. Thus, escept for the gas advertising ban, each of the "omitted" facts that PSC asserts on this motion was considered by the court and either weighed



in evaluating PSC's interests, or deemed irrelevant or immaterial to a ban on advertising, as opposed to a restriction on use. The Supreme Court decisions relied upon in the March 30 decision make it clear that an otherwise entirely lawful commercial activity may not be regulated indirectly by prohibiting truthful advertising to consumers about that activity.

The factual issues referred to by PSC to the merits of direct regulation of electric space heating, and, therefore, are not material to a decision on LILCO's first amendment rights in the promotional advertising of such an activity. PSC's motion pursuant to FRCP 52(b) is, therefore, denied, and PSC's request for a stay pending determination of the motion is denied as moot.

PSC seeks, in addition, a stay of the court's March 30, 1979 order pending appeal to the Second Circuit. Under FRCP 62(c), the district court may, in its discretion, stay the effect of an injunction during the pendence of an appeal. The ban of which LILCO complains and now has had invalidated was imposed in 1973. LILCO waited until

1977 to challenge that ban in this action. The questions presented are of significant public importance, and it does not appear that LILCO will suffer any significant injury if its promotion of electric heat is delayed another few months in addition to the five years it took for the issue to be submitted to this court for determination. Accordingly, the request for a stay pending appeal of that portion of the court's judgment which enjoined enforcement of the ban on promotional advertising of electric heat is granted on condition that PSC diligently prosecute the appeal.

Finally, in the court's memorandum and order of March 30, 1979, lines 15-16 on page 5 (Part II, C. State Court Proceedings) is hereby amended to read as follows: "Third Department affirmed on the promotional advertising issue, and reversed on the bill insert issue * * *."

SO ORDERED.

Dated: Westbury, New York
April 16, 1979

/s/
GEORGE C. PRATT
U. S. DISTRICT JUDGE